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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 84.

CITY BANK FARMERS TRUST COMPANY, Executor under the Will of THOMAS B. CLARKE, Deceased,

Appellant,

vs.

WILLIAM A. SCHNADER, Attorney General of the Commonwealth of Pennsylvania, and LEON D. METZGER, Secretary of Revenue of the Commonwealth of Pennsylvania.

MOTION ON BEHALF OF THE TAX COMMISSION OF THE STATE OF NEW YORK FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF.

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COME Now, Mark Graves, John J. Merrill and John P. Hennessey, constituting the Tax Commission of the State of New York, and move this Honorable Court for leave to file the annexed brief as *amici curiae.*

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BRIEF ON BEHALF OF THE TAX COMMISSION OF THE STATE OF NEW YORK AS *AMICI CURIAE.*

Statement.

This case is here on appeal from the United States District Court for the Eastern District of Pennsylvania, which dismissed the bill of complaint for want of equitable jurisdiction. The primary question at issue is whether the Courts of the United States have equitable jurisdiction. With this question the Tax Commission of the State of New York is not especially con-

cerned. However, counsel for the appellant, in their brief, request that this Court make final disposition of the case on the merits and, if it is found that there is jurisdiction, the Tax Commission of the State of New York will be interested on the merits. It is therefore requested that this brief be considered in the event this Court shall see fit to take jurisdiction and decide the issue without referring it back to the District Court.

The facts of the case are correctly and adequately summarized in the brief of appellant, and it is unnecessary to repeat them here.

The question at issue is whether the collection of portraits owned by Mr. Thomas B. Clarke during his lifetime, which, in 1928, were loaned by him to the Philadelphia Museum of Art for exhibition purposes and which remained on exhibition in said Museum up to the time of his death on January 18, 1931, are subject to the death tax of the Commonwealth of Pennsylvania by virtue of such portraits having acquired an actual situs in said Commonwealth with such a degree of permanency as to divorce them from the operation of the law of the State of New York, in which Mr. Clarke was domiciled, and subject them to Pennsylvania law; in other words, the question is whether the transfer of said portraits upon the death of the owner was effected by the law of New York, on the one hand, or by the law of Pennsylvania, on the other.

ARGUMENT.

POINT I.

The collection of portraits owned by Thomas B. Clarke at the time of his death had its situs at his domicile in New York and the transfer thereof was made effective by virtue of New York Laws. Pennsylvania is without jurisdiction to impose a death tax.

That the state whose laws effected the transfer is the only one which has jurisdiction to impose a tax upon the privilege of succession under Mr. Clarke's will is established by the decisions in *Frick v. Pennsylvania*, 268 U. S. 473, and *First National Bank of Boston, Executor of Haskell v. State of Maine*, 284 U. S. 312.

It is conceded that the portraits had their permanent situs in New York prior to the time they were shipped to Philadelphia. It also seems to be agreed by all parties that if they thereafter acquired a permanent situs in Pennsylvania the law of that state accomplished the transfer, either directly or by giving recognition to the law of New York *(Frick v. Pennsylvania, supra)*, but that if they had only a temporary location in Pennsylvania they retained their permanent situs at the testator's domicile in New York, passed under the laws of that state and are subject to death taxation there. Hence, it must be decided whether, upon the facts of the case, the paintings had lost their permanent situs in New York and acquired a new permanent situs in Pennsylvania.

It is now settled by the decisions of this Court that real property can be subjected to death taxation by the state of its situs and none other, and also that intangible personal property (with the possible exception of such as may have a business situs in a state other than that of the owner's domicile) has its situs at the domicile of the owner and may be taxed for death purposes by the state of such situs only. With respect to tangible personal property, the trail is not so clearly blazed. If tangible personal property has an actual or permanent situs away from the state of the owner's domicile, the toll of death duties with respect thereto must be paid to the state where it is so situated and, of course, if its actual or permanent situs be in the state of the owner's domicile, it may be there subjected to death taxation and not elsewhere. But, where tangible personal property at the time of the owner's death is physically in a state in which he was not domiciled, for a temporary period or purpose and without intent of permanency, it may still be taxed at his domicile and not where physically located, because its actual or permanent location at the domicile has not been lost.

As is pointed out in appellant's brief, from a legal standpoint the question is closely analogous to that of domicile. That is to say, the *domicile* of the property must be determined. A person's domicile of origin persists until it is shown to have been changed, and two things are necessary to establish a change, viz., actual residence elsewhere, plus an intention to make such residence the domicile. The rule with respect to the situs of tangible personal property should be and is believed to be similar. Not alone should there be

physical presence of the property away from the owner's domicile, but it should be coupled with an intent on the part of the owner that it should have an actual or permanent situs where so located, such intent to be established by reference to all the facts and circumstances of the case, as is done where the domicile of a person is at issue.

Mr. Clarke was a patron of the arts, and at considerable expense and effort, over a period of years, had assembled the finest collection of early American portraits in existence, a collection that was and is of world wide interest and of great value. He kept these paintings at his domicile in New York but was generous in making them available to public inspection by loaning them from time to time for exhibition on various occasions. Even while the collection was on exhibition at Philadelphia, he loaned part of it for exhibition in Virginia. His act in loaning the collection to the Philadelphia Museum of Art was not primarily one of his own volition. He did so at the solicitation of his old time friend, Dr. Kimball, and in connection with the opening of the Museum, of which his friend was the director. He made the loan without recompense, although without doubt he could have secured substantial sums for the use of the collection by other institutions. Very clearly, he had no intention whatsoever that during his ownership the paintings should remain in Philadelphia permanently, but always intended that they should be returned to their regular place of custody at his home and domicile in New York.

It has been properly suggested by the state officers of Pennsylvania that works of art are of no value if

locked up and concealed from public view, but rank with the proverbial light hidden under a bushel. The real value of art is in its display where people may see it. Fortunate is any community to be peopled by men and women having a knowledge and appreciation of the fine arts. When Mr. Clarke consented to the exhibition of his collection in Philadelphia, he conferred a great boon, not alone on that city but on the entire State of Pennsylvania, whose metropolis it is. His act materially added to the cultural development of the people of the city and state, but the taxing authorities of the state seem inclined to discourage like generosity on the part of others.

The policy of Pennsylvania with respect to public art exhibits is shown by its statute exempting bequests of art objects for such purposes from death taxation (Act of July 9, 1919, P. L. 794, as amd. by Act of June 12, 1931, P. L. 553—pp. 5-6 of Record). This statutory provision is persuasive evidence that the State Legislature never intended to tax such objects merely because they happened to be on exhibition in the state at the time of the owner's death.

The value of the paintings was $714,750, upon which the annual increment would be, say, $35,000. This sum Mr. Clarke gave freely and willingly for the benefit of Pennsylvania and Pennsylvanians. In reciprocation, the taxing authorities of that state seek to exact a ten per cent tax from the beneficiaries of his will. Public policy and the encouragement of others to emulate Mr. Clark's example should be strongly persuasive to a decision that will not impose a penalty for his bounty.

In passing, notice may be taken of one of the arguments made by the Pennsylvania authorities in the District Court, viz., that inasmuch as Mr. Clarke gave up the storage place in New York where he had kept the portraits and received free storage at the museum in Philadelphia, he benefited by the transaction. Was he supposed to continue to pay for storage in New York which he was not using, or should he have paid the museum for storage in addition to the gratuitous loan of the collection? Does not the fact that it has been found necessary to resort to such an argument as this indicate the essential weakness of defendants' cause?

The temporary character of the location of the portraits in Philadelphia is manifested when it is borne in mind that they were originally loaned for use only in connection with the formal opening of the museum. There can be no doubt that during the time of the opening exhibition the presence of the paintings in Pennsylvania was only temporary and of a transitory character. Thereafter, from time to time, Mr. Clarke requested their return, but on each occasion, at the earnest solicitation of Dr. Kimball and because of the great appreciation shown by the public, he consented to leave the paintings at the museum for a further temporary period. Altogether the paintings had been on exhibition in the museum for approximately two years and ten months prior to the decedent's death. The original loan was not for that period, nor for any definite period, and actually was intended to be for a much shorter time. The fact that several requests for the return of the paintings were made during the period of the loan establishes that the decedent did not

intend to leave them in Philadelphia for any extended time. Furthermore, since several such requests were made, it must have been that only a short time intervened between each request. If necessary to support a decision in favor of appellant, this Court might well find that each request for the return of the collection was sufficient to establish a new date from which to compute the time element to be taken into consideration in determining the question of the acquisition of a permanent situs.

It is well established that the character and use of tangible personal property has much to do with the determination of the question of whether or not it has acquired a permanent situs when separated from the domicile of its owner.

(See *Irvin v. N. O., St. L. & C. R. R. Co.*, 94 Ill. 105).

Reference is made to a Pennsylvania decision, which seems to have attained the status of a leading case, since it has frequently been referred to with tacit approval in opinions of this Court. This decision is *Commonwealth v. American Dredging Co.*, 122 Pa. St. 386, in which it appeared that a Pennsylvania corporation owned certain dredges and a tug boat and scows which were located outside the State of Pennsylvania. The corporation was assessed for taxation upon its capital stock, including the value of these vessels, although they had never been within the limits of the State during the entire tax year. It objected to the inclusion of the value of the vessels in its capital stock, upon the ground that since they were without the State and had never been within it, they were not

liable to taxation by it. It was held that the value of this tangible personal property was properly subject to tax, the Court saying (p. 391):

> "It must be conceded that the property in question must be liable to taxation in some jurisdiction. If it were permanently located in another state, it would be liable to taxation there. But the facts show that it is not permanently located out of the state. From the nature of the business, it is in one place today and in another tomorrow, and, hence, not taxable in the jurisdiction where temporarily employed. It follows that if not taxable here, it escapes altogether. The rule as to vessels engaged in foreign or inter-state commerce is that their situs for the purpose of taxation is their home port of registry or the residence of their owner, if unregistered; Pullman Palace Car Co., 29 Fed. Rep. 66; Hays v. Pacific Mail Steamship Co., 17 How. 596. These vessels, if they may be so called, were not registered. Hence, their situs for taxation is the domicile of the owners. This rule must prevail in the absence of anything to show that they are so permanently located in another state as to be liable to taxation under the laws of that state."

It is common knowledge that dredging operations, particularly at seaports, frequently extend over a long period of time. Sometimes dredges and the tug boats and scows operated in connection with them are engaged for several years on one operation. Therefore, it would seem that the case last cited is almost direct authority to substantiate the contention made by appellant.

In *Delaware, L. & W. R. R. Co. v. Pa.*, 198 U. S. 341, a case which denied the right of Pennsylvania to tax a corporation on coal mined in that State but which had

been taken out of the State never to be returned, the *American Dredging Co.* decision was discussed and distinguished by this Court at page 356, as follows:

> "The asserted transitory nature of this property" [the coal] "does not seem to us to be material. At the time of the appraisement it had been transported beyond the jurisdiction of the State, never to return in kind, but was intended to be sold in the foreign State. Such property is entirely unlike the property involved in *Commonwealth v. American Dredging Co.*, 122 Pa. St. 386. That property consisted of vessels, or scows, or tugs, only temporarily out of the State of Pennsylvania, for the purpose of engaging in business, and liable to return to the State at any time, and was without any actual situs beyond the jurisdiction of the State itself."

It may be remarked that although it appeared in the *American Dredging Co.* case that the vessels were outside the State of Pennsylvania for at least the period of the taxable year, it did not appear for how long a period in addition to that year they had been outside the jurisdiction. The Court apparently did not deem the length of time during which the property had been and would be out of the State important, but merely considered the temporary character of its absence from Pennsylvania. It is respectfully submitted that this is the correct rule, and that property may be temporarily without the borders of a state for an extended period without that state losing jurisdiction over it. The character of the property is an important evidentiary fact to be considered in determining whether the location without the state is permanent or temporary. Dredges, barges, etc., owned by a dredging company would have but a temporary location at the place of their employment in the business of the company, no

matter how long they might be engaged there. So, too, paintings loaned by an art collector to a museum for exhibition with the understanding that they should be returned to him when the exhibition had been accomplished, would have only a temporary situs at the place where the exhibition was held, especially if the collector loaned them in the course of a custom which he had pursued for many years of exhibiting them around and about.

In considering this case, it must be remembered that the works of art owned by Mr. Clarke should be treated not merely as paintings but as a collection of paintings, the only appropriate use of which was to exhibit them to the public. They could only have value to him by reason of their use in such manner, just as the vessels of the dredging company could only be of use to it in transitory operations. To illustrate, Mr. Clarke might have stored his paintings in Pennsylvania, and, if so, they might have acquired a permanent situs there because their use as exhibition pieces would have terminated. They could not, however, acquire a permanent situs in that State by reason of a temporary loan to the museum there, as their original situs was in New York, to which State they were to be returned in accordance with their owner's wishes and course of dealing with them.

In *Gromer v. Standard Dredging Co.*, 224 U. S. 362, Porto Rico attempted to tax certain machinery and boats which at the time the taxes were levied were in the harbor at San Juan engaged in dredging work in pursuance of a contract of the defendant with the United States Government. The defendant was a Dela-

ware corporation. It did not appear how long the dredging machinery had been located in the harbor. The property was held to be taxable, but the prevailing opinion commented upon the fact that the question of temporary situs in the waters of Porto Rico had not been raised and was not in the case. Mr. Justice Day wrote a dissenting opinion, which was concurred in by Mr. Justices Hughes and Lamar. These Justices thought that the question of jurisdiction was important, and said (pp. 376-7):

> "It requires a showing that the property sought to be taxed is incorporated in or commingled with the property of the taxing authority, before it can become liable to taxation in any other jurisdiction than that of the domicile of the owner. *Commonwealth v. American Dredging Co.*, 122 Pa. St. 386 (see *infra*).
>
> "The decisions in this court indicate that personal property of a tangible character, to become taxable, must have acquired a *situs* of a permanent nature within the jurisdiction of the authority seeking to levy the tax. The use of the term 'permanent' in this connection may not mean the continued and unchangeable location of the property at a given place, but certainly does intend to include the idea of location which is not of a temporary or fleeting character."

The opinion continues (p. 379):

> "Tangible personal property is taxable at the owner's domicile, except where it is shown to have an actual *situs* elsewhere, and, as we have seen, actual *situs* is not gained when the property comes only temporarily within the taxing jurisdiction. Applying this test, we are of the opinion that this dredging outfit had not become incorporated into the personal property of the Territory of Porto Rico, as manifestly it was there temporarily only. In our judgment this situation falls far short of

> a location in Porto Rico sufficient to subject it to the taxing power of that Territory."

The fact that the language above quoted is contained in a dissenting opinion is not an indication that the views expressed were contrary to those of the majority of the Court, for the question of temporary situs was not in the case, and therefore they refrained from reference to it.

The views of Justices Day, Hughes and Lamar were in accord with the decision of this Court in *Morgan v. Parham*, 16 Wall. 471, which involved an attempt by the State of Alabama to impose a tax upon a coasting vessel plying between Mobile and New Orleans. This Court said (p. 476):

> "It is the opinion of the court that the State of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that State, but was there temporarily only"

The vessel in the *Morgan* case was in regular trade between Mobile and New Orleans, and undoubtedly was in Mobile for a substantial portion of the year. It is entirely possible that the aggregate period during which it was in Alabama was far in excess of the period during which the Clarke paintings were in Pennsylvania. The case turned upon the point that the vessel had not become incorporated into the personal property of Alabama. Likewise, it cannot be said that the paintings of Mr. Clarke had become incorporated into the personal property of Pennsylvania.

Another decision closely in point is that in *Joiner v. Pennington,* 143 Ga. 438. There the facts indicate that a portable saw mill had been taxed in a county other than that in which the owner had his domicile. It was alleged that the mill had been for a year in the county in which it was taxed. The Court said that even so its location in the taxing county might have been only temporary. It further said (p. 440):

> "'If the mill is actually a portable saw mill, remaining only temporarily in the place to which it may be carried for operation, and if as a matter of fact it is carried from county to county, then it is clearly taxable as personal property belonging to the owner in the county of Jefferson, that is, the county of petitioner's" [the owner's] "residence * * *."

It is obvious that it was the character of the saw mill and the nature of its use which governed the Court in its decision and not the element of time. If the location away from the owner was temporary, even though it had existed for a year, it could have been temporary had it lasted for three years if other conditions remained the same.

In *Capital Const. Co. v. City of Des Moines,* 211 Iowa 1228, it appeared that the plaintiff, a contracting firm, had machinery in Illinois, where it was used on a construction project for a whole year, after which it was returned to Iowa. The plaintiff objected to a tax upon the value of the machinery in the State of Iowa. The Court in its opinion said (p. 1230):

> "The absence of the machinery from the state of Iowa, therefore, was only temporary, and not of a permanent nature."

For this reason the machinery is held to be taxable in Iowa.

In *Semple v. Commonwealth*, 181 Ky. 675, a resident of Texas complained of a tax in the State of Kentucky upon his furniture, automobile and bank account, which apparently had been in Kentucky for a considerable period of time and probably for at least a year. He frequently visited in Kentucky where he maintained an apartment under a yearly lease. At page 682 of the Court's opinion it was said:

> "In order that personal property may have a situs for taxation in a locality different from the domicile of its owner, such personal property must be permanently located at the place where it is sought to be taxed. No temporary location will alter its situs for taxation at a place other than the residence of its owner."

The furniture and automobile were held nontaxable.

The facts in the case at bar make it apparent that the portraits owned by Mr. Clarke were loaned by him to the City of Philadelphia for a purpose which wholly excluded the idea of the acquisition by them of a permanent situs in Pennsylvania.

It is true that the maxim *mobilia sequuntur personam* has not at all times been applied in the same way. It had its birth at a time when the great mass of personal property was tangible, but its application to that class of property has been modified to the extent that it is held not to apply where tangible personal property has acquired an actual and permanent situs away from the domicile of the owner (see *Union Re-*

frigerator Transit Co. v. Kentucky, 199 U. S. 194). The maxim still applies with respect to tangible personal property which has not acquired a permanent situs away from the domicile of the owner, even though it may never actually be found at the domicile of the owner (see *Southern Pacific Company v. Kentucky*, 222 U. S. 63). With respect to intangible personal property, which was almost unknown when the maxim originated, it applies with full force and vigor, at least so far as death taxation is concerned (see *First National Bank of Boston, Executor of Haskell, v. State of Maine*, 284 U. S. 312, *supra*). The point is that the maxim is applied by the courts when convenience and justice require and when it is necessary to apply it in order to prevent injustice. The instant case would seem to be one in which it is necessary to apply it in order to prevent a gross injustice.

To illustrate how great an injustice might result if appellant is denied the relief it seeks, suppose that under the law of Pennsylvania bequests of personal property could be made only to direct heirs and that bequests to collaterals were invalid. Assume further that the testator, a resident of New York, bequeathed the paintings to collateral relatives. Would this Court say that the will was invalid and that the wishes of the testator must be frustrated merely because of the fact that during his lifetime, moved by a spirit of philanthropy, he had seen fit to loan the paintings for exhibition in Pennsylvania? Or would it, on the other hand, decide that such was a case where in order to prevent injustice the *mobilia sequuntur personam* maxim should be applied so as to permit the wishes of the testator to be carried into effect? If the be-

quest under such circumstances would be held valid, the same considerations dictate that Pennsylvania be denied the right to tax the paintings, because the basis of death taxation is the granting by a state of the right of succession.

This Court has never held that tangible personal property which is only temporarily away from the owner's domicile may not be taxed by application of the *mobilia sequuntur personam* rule, and it is respectfully urged that no such doctrine should be enunciated in this case.

The decision of this Court in *Frick v. Pennsylvania*, 268 U. S. 473, *supra*, upon which considerable stress is laid by the Pennsylvania authorities, may be distinguished in very few words. In that case, there was no question of the permanency of the location of the tangibles involved for they were situated in part in an art gallery built for their reception in the City of New York and in part at the summer home of the decedent. Of course, tangibles so situated, with no intention of moving them to the domicile of the owner, are taxable where located. The case is entirely different from the one at bar.

The position of *amici curiae* in this brief is in accord with the law as it has been interpreted in the State of New York. In the *Estate of Charles W. Hawthorne*, Surrogate Foley of New York County, on June 9, 1931, made an order exempting from taxation the transfer in the estate of a nonresident of New York of paintings loaned by him for exhibition to an art gallery in the City of New York. Mr. Hawthorne's dom-

icile was in the State of Massachusetts. He was the owner of a collection of paintings which he was accustomed to send to different art galleries throughout the country. His death occurred on November 29, 1930. At that time, and for several years prior thereto, certain of his paintings had been on exhibition at the Grand Central Art Galleries in New York City. This institution sometimes exhibited the paintings in their own galleries in New York and sometimes sent them to be exhibited at other art galleries. Mr. Hawthorne, himself, from time to time withdrew some of his paintings from the custody of the Galleries and exhibited them elsewhere. At the time of his death, forty-eight of his paintings were on exhibition in New York. Under the regulations of the Galleries, Mr. Hawthorne was privileged to exhibit there such pictures as he chose and could withdraw any or all of them at any time.

The Grand Central Art Galleries is a New York membership corporation, not conducted for profit, and its purpose is to promote interest in art and encourage and assist living American artists. Its galleries are open to the public. Pictures loaned to it are displayed therein, and frequently special exhibitions are held of the works of different individual American artists.

The Surrogate of New York County made the order of exemption above referred to, even though the facts did not present as strong a case for exemption from the New York tax as is presented by the facts before this Court for exemption from the Pennsylvania tax, inasmuch as it did not appear that the Hawthorne paintings had ever had a situs in Massachusetts before they were sent to New York.

Although the New York Tax Commission had the right of appeal from this order of the Surrogate, they acquiesced in the decision, believing that it was correct not only from the standpoint of law but also from that of public policy. Their action in filing this brief is consonant with and for the purpose of upholding the position so taken by them.

All of which is respectfully submitted.

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